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NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

In the Matter of: Cusato Brothers International, Inc., Bankrupt

James B. McCracken, Trustee and State of Florida, Petitioner

v

Great American Bank of Broward County.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respectfully submitted,

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above cause, sub nom in the matter of: Cusato Brothers International, Inc., Bankrupt, Great American Bank of Broward County v. James B. McCracken, Trustee and State of Florida entered on January 15, 1985.

QUESTION PRESENTED FOR REVIEW

WHETHER THE SALES CONDUCTED BY A BANKRUPTCY TRUSTEE IN LIQUIDATING THE INVENTORY OF A DEBTOR-ALCOHOLIC BEVERAGE DISTRIBUTOR ARE "CONDUCTING ANY BUSINESS" SO THAT THE SALES ARE SUBJECT TO FLORIDA EXCISE TAXES

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit for which review is sought is reported at 750 F. 2d 887 and is reproduced at Appendix B, infra, page 31b.

The opinion of the United States District Court for the Southern District of Florida is unreported and is reproduced at Appendix A, infra, page 21a.

The opinion of the United States Bankruptcy Court for the Southern District of Florida is unreported and is reproduced at Appendix A, infra, page 18a.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit (Appendix B, infra, page 1b) was rendered on January 15, 1985. No petition for rehearing was filed. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. XXI, § 2:

> The transportation or importation into any State, Territory of possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

28 U.S.C. § 959(b):

> A trustee, receiver or manager appointed in any cause pending in any Court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which said property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

28 U.S.C. § 960:

> Any officers and agents conducting any business under authority of a United States Court shall be subject to all Federal, State and local taxes applicable to such businesses to the same extent as if it were conducted by an individual or corporation.

Fla. Stat. § 563.05 (1981):

> Excise taxes on malt beverages. -- As to malt beverages containing more than 1 percent of alcohol by weight, there shall be paid by all manufacturers, distributors, and vendors, as herein defined, a tax of 40 cents per gallon upon all such beverages in bulk or in kegs or barrels, and, when sold in containers of less than 1 gallon, the tax shall be 5 cents on each pint or fraction thereof in said container. However, the excise taxes required to be paid by this section upon malt beverages

containing alcohol of not more than 3.2 percent by weight shall not be required to be paid upon such beverages when the same are sold to post exchanges, ship service stores, and base exchanges located in military, naval, or air force reservations within this state.

Fla. Stat. § 564.06 (1981):

Excise taxes on wines and beverges; exemptions. --

(1) As to beverages including wines, except natural sparkling wines and malt beverages, containing more than 1 percent alcohol by weight, there shall be paid by all manufacturers and distributors a tax at the rate of $1.75 per gallon.

. . . .

(3) As to all wines except natural sparkling wines containing 14 percent or more alcohol by weight, there shall be paid by manufacturers and distributors a tax at the rate of $2.43 per gallon . . .

(4) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of $3.50 per gallon . . . .

. . . .

(7) Every distributor selling wine within the State shall pay the tax to the Division monthly on or before the tenth day of the following month, less 2.4 percent of the tax due, which shall be withheld by the distributor for the keeping of prescribed records, furnishing bond, and properly accounting for and remitting taxes due to the State. However, no allowance shall be granted or permitted when the tax is delinquent at the time of payment.

Fla. Stat. § 561.50(1) (1981):

One State tax payment; reports. --

(1) There shall be only one State tax paid as to each gallon or fraction thereof of beverage

sold under the Beverage Law, and no other excise tax shall be levied directly or indirectly. Such tax shall be computed from the reports, books and records of manufacturers and distributors; and the amount so computed shall be remitted with the report required by s. 561.55 to the division at intervals of one month, on or before the tenth of each month, for all beverages sold during the previous calendar month, and such payment of tax shall accompany the report required by s. 561.55. If the monthly tax liability of a manufacturer or distributor exceeds the amount of the bond furnished for payment of taxes, the division, upon a finding based upon substantial and competent evidence that the security of the tax revenue involved is in jeopardy, may require a bond equal to the anticipated tax liability of the manufacturer or distributor.

STATEMENT OF THE CASE

The judgment sought to be reviewed was an appeal from the judgment of the United States District Court of Appeals for the Southern District of Florida (Appendix A, page 21a) reversing an order of the United States Bankruptcy Court for the Southern District of Florida (Appendix A, page 18a).

Cusato Brothers, a corporation licensed by the State of Florida as a beer and wine wholesale distributor, filed a voluntary bankruptcy petition in June, 1982. The case was subsequently converted to a Chapter 7 proceeding. The trustee, James B. McCracken, liquidated the debtor's beer and wine inventory pursuant to court order. After liquidation, Great American

Bank of Broward County, a secured creditor filed a complaint for declaratory and injunctive relief in which it asked the bankruptcy court to rule on whether the proceeds of the liquidation sale of the debtor's inventory were subject to Florida excise taxes. Section 563.05, Florida Statutes, levies an excise tax on manufacturers, distributors, and vendors of malt beverages, and Section 564.06, Florida Statutes, imposes an excise tax upon manufacturers and distributors of wine. Under Section 561.50(1), Florida Statutes, all excise taxes are collected at the distributor level rather than at the retail level. The bankruptcy court found that the trustee for the debtor was not liable for

excise taxes levied pursuant to Sections 563.05 and 564.06, Florida Statutes. The District Court reversed. The United States Court of Appeals for the Eleventh Circuit reversed the judgment of the District Court and affirmed the judgment of the Bankruptcy Court. (Appendix B, page 31b).

The Bankruptcy Court had jurisdiction under the provisions of U.S.C. § 1471 and the United States District Court for the Southern District of Florida had jurisdiction under the interim provisions of 92 Stat. 2686.

ARGUMENT I

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS DECIDED THAT WHERE THE TWENTY-FIRST AMENDMENT AND CONGRESS' POWER UNDER THE BANKRUPTCY CLAUSE CONFLICT, THE POWER OF CONGRESS CONTROLS. THIS IS AN ISSUE WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.

Of importance to this petition is the nature of the inventory liquidated by the trustee in bankruptcy. The assets sold by the trustee consisted of alcoholic beverages, i.e., wine and beer, which had been held by the debtor pursuant to a distributor's alcoholic beverage license issued to it under the provisions of Florida's Beverage Code. The debtor's business was not one engaged in it by right but instead was one allowed to it only by the grace of the State of Florida under the provisions of the Twenty-first Amendment to the United States Constitution.

The Twenty-first Amendment provides that a state may absolutely prohibit the manufacture, sale, transportation or possession of alcoholic beverages. Alternatively it may permit the manufacture, sale, transportation or possession of such beverages only under definitely prescribed conditions. Ziffrin Inc. v. Reeves, 308 U.S. 132 (1939). See also, California v. LaRue, 409 U.S. 109 (1972). In Florida the distribution of alcoholic beverages is conditioned on payment of an excise tax. The power of the State of Florida to so condition distribution of alcoholic beverages within its borders is paramount.

On the other hand, the federal government possesses paramount power with respect to bankruptcies. New York v. Irving Trust Co., 288 U.S. 329 (1932).

The Eleventh Circuit in the case here sought to be reviewed has held that the bankruptcy process cannot be burdened by state taxes. Matter of Cusato Brothers International, Inc., 750 F.2d 887 (11th Cir. 1985) (Appendix B, at page 1b). The competing interests of the state with respect to alcoholic beverages and the federal government with respect to bankruptcies have collided. Generally, judicial deference is due state beverage regulations. Larkin v. Grandel's Den, Inc., 459 U.S. 116 (1982). The Eleventh Circuit concluded, however, that the state's exercise of its sovereignty under the provisions of the Twenty-first Amendment is an impermissible burden on the processes prescribed by Congress for liquidation in bankruptcy.

The interrelationship between the Twenty-first Amendment and the bankruptcy processes is an important issue which should be decided by this Court.

ARGUMENT II

THE HOLDING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT THAT BANKRUPTCY PROCESSES SUPERSEDE THE STATE'S SOVEREIGNTY OVER ALCOHOLIC BEVERAGES WITHIN ITS BORDERS, CONFLICTS WITH A DECISION OF THIS COURT THAT CONGRESS' POWER UNDER THE BANKRUPTCY CLAUSE CANNOT BE EXERCISED TO IMPAIR STATE SOVEREIGNTY.

The holding of the United States Court of Appeals for the Eleventh Circuit is also in conflict with this Court's holding in Ashton v. Cameron County Water Improvement District, 298 U.S. 513 (1936). The Eleventh Circuit held that the imposition in a liquidation proceeding of a state tax on the distribution of alcoholic beverages was "inconsistent with the designation by Congress in 28 U.S.C. § 960 that sales in the course of conducting a business is the sole area in which the state is permitted to impose a tax."

Matter of Cusato Brothers International, Inc., supra, (Appendix B. at page 18b). By assigning such a narrow scope to the terms of 28 U.S.C. § 960 the Eleventh Circuit has contradicted this Court's decision in Ashton, supra.

The issue in Ashton was whether an act of Congress authorizing the bankruptcy of a political subdivision of a state was beyond the power of Congress. This Court held that the power of the federal government under the bankruptcy clause could not be exercised to impair state sovereignty. Id. at 531. The state sovereignty impaired by the contested statute in Ashton was the traditional right of a sovereign to control its fiscal affairs. Id. at 528. See generally, National League of Cities v. Usery, 426 U.S. 833 (1976).

Here, the state's power over the distribution of alcoholic beverages within its borders is not within the realm of traditional state sovereignty. Instead, the sovereignty of the state in this area springs from an express grant of power in the Constitution. U.S. Const. amend. XXI. The Eleventh Circuit's narrow construction of 28 U.S.C. § 960 has ascribed power to Congress which it does not possess -- the power to impose its will over the state's exercise of power granted to it by the Constitution. In essence, the Eleventh Circuit has determined, conversely to this Court's holding in Ashton, that state sovereignty may not burden Congress' power under the bankruptcy clause.

ARGUMENT III

THE HOLDING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT THAT THE ASSETS OF THE BANKRUPTCY ESTATE ARE EXEMPT FROM STATE TAXATION CONFLICTS WITH A DECISION OF THIS COURT THAT PROPERTY IN THE BANKRUPTCY ESTATE IS NOT RELIEVED OF ITS OBLIGATIONS TO THE STATE.

In holding that the liquidation sale of inventory by a trustee in bankruptcy is exempt from taxation, the United States Court of Appeals for the Eleventh Circuit has decided a federal question in conflict with a prior decision of this Court on the issue.

In Swarts v. Hammer, 194 U.S. 441 (1904) the issue before the Court was the validity of taxes imposed upon property in the hands of a trustee in bankruptcy. The Court said:

> By the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property.

> It is dedicated, it is true, to the payment of the creditors of the bankrupt but there is nothing in that to withdraw it from the necessity of protection by the State and municipality, or which should exempt it from its obligations to either. If Congress has the power to declare otherwise and wished to do so the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.

The holding of the Eleventh Circuit that the liquidation sale of inventory is not subject to state taxation is in direct conflict with the holding in Swarts v. Hammer that property in the bankrupt estate is not exempt from its obligations to the state.

ARGUMENT IV

THE HOLDING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT THAT A BANKRUPTCY TRUSTEE LIQUIDATING INVENTORY IS NOT LIABLE FOR STATE TAXES CONFLICTS WITH DECISIONS FROM THE SECOND, THIRD, FIFTH, SIXTH, SEVENTH, EIGHT AND NINTH CIRCUITS HOLDING THAT STATE TAXES ARE DUE ON LIQUIDATION ACTIVITIES.

The United States Court of Appeals for the Eleventh Circuit has held that a trustee in bankruptcy is not responsible for the payment of State taxes on the liquidation sale of a debtor's inventory. Matter of Cusato Brothers International, Inc., (Appendix B). All other courts of appeals which have addressed the issue of taxation of liquidation processes generally, or liquidation sales of inventory in particular, have held that such sales are the conduct of business subject to state taxes under the provisions of 28 U.S.C. § 960.

In support of its contrary decision the Eleventh Circuit relied on the rationale of California State Board of Equalization v. Goggin, 245 F.2d 44 (9th Cir. 1957) cert. denied, 353 U.S. 961 (1957) that a tax on the liquidation sale of tangible personal property was an impermissible burden on the bankruptcy process and inconsistent with Congress' intent that only sales in the course of conducting business are taxable under the provisions of 28 U.S.C. § 960.

Significantly, the liquidation sale in Goggin was of delivery trucks of a debtor whose business was the sale of cabinets. The Ninth Circuit held that the California State Board of Equalization could not collect from the trustee in bankruptcy, or from a purchaser from him, any tax based upon the sale of debtor's trucks. The Ninth Circuit, however, has

distinguished between the liquidation sale of a debtor's tangible personal property and the liquidation sale of a debtor's inventory. In United States v. Sampsell, 266 F.2d 631 (9th Cir. 1959) the debtor was in the real estate business and the assets being liquidated were parcels of real property. The Ninth Circuit said:

> The bankrupt was a real estate corporation and the sale of property by it could be considered as part of its normal operation as well as liquidation. It is not the same as selling of the tools and equipment of production by a manufacturing company or as the sale of trucks used in distributing produced merchandise.

266 F.2d at 633-34, citing Louisville Property Co. v. Commissioner, 140 F.2d 547 (6th Cir. 1944) (liquidation of real estate company's parcels is operating business).

The Second, Third, Fifth, Seventh, and Eighth circuits also have addressed the issue of state taxation of liquidation processes and each has determined that such taxes are due. In State of Missouri v. Gleick, 135 F.2d 134 (8th Cir. 1943) the issue was whether a trustee in bankruptcy was liable for Missouri unemployment compensation taxes on individuals who performed services for the trustee in connection with liquidation of the estate. The Eighth Circuit said:

> The phrase "conduct any business" should not receive a narrow and restricted interpretation, but should be construed to include any activity or operation in connection with the handling and management of the bankrupt estate. That this was the intention of Congress is clear from the further language of this section [28 U.S.C.A. Section 124a]

> which makes the trustee "subject to all State and local taxes applicable to such business . . . as if such business were conducted by an individual or a corporation." Obviously if the bankrupts themselves liquidated their respective businesses they would each be liable for contributions with respect to services performed for them in connection with such liquidation.

135 F.2d at 137.

In the case of In Re: I. J. Knight Realty Corp., 501 F.2d 62 (3rd Cir. 1974) the Third Circuit held that where the debtor was in the business of leasing space in an office building and where the office building was its only asset, the interest earned on insurance proceeds after the building burned was taxable income.

And in Pinkerton v. United States, 73 F. Supp. 590 (S.D.Ill. 1947), affirmed, 170 F.2d 846 (7th Cir. 1948) income tax on collection of assets (rent) was due where the debtor's business was rent collection.

Finally, in the case of In Re: Hatfield Construction Co., 494 F.2d 1 179 (5th Cir. 1974) and the case of In Re: Leavy, 85 F.2d 25 (2nd Cir. 1936) the trustees conducted liquidation sales on which the courts approved the imposition of sales tax. In a passage from Leavy quoted in Hatfield, the Second Circuit said:

> What the trustee is really complaining of is, not that a burden has been imposed on the exercise of his functions, but of his inability to sell to a purchaser who would be exempt from a tax and because of such an exemption would pay a higher price to him than would ordinarily be paid for the goods sold. It seems unreasonable

> to treat the absence of an exemption from taxes as a burden upon the normal exercise of governmental function.

85 F.2d at 27.

Thus in all circuits which have addressed the issue, except the Ninth Circuit, liquidation sales have been subject to taxation. In the Ninth Circuit a distinction is made between liquidation sales of inventory and liquidation sales of other assets, the former being subject to taxation. Only the Eleventh Circuit in the judgment here sought to be reviewed, has held that the liquidation sale of inventory is exempt from taxation.

Only the Ninth Circuit in Goggin and the Eleventh Circuit here prohibited taxation of sales in liquidation. The Eleventh Circuit stands alone among the

circuits in prohibiting the taxation of liquidation sales of inventory.

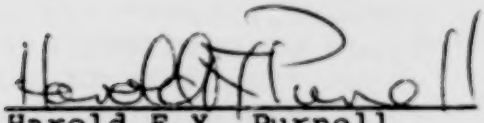
In dissent to the majority holding of the Eleventh Circuit Judge Hill said:

> Although liquidation sales of inventory by a trustee are terminal, these are the same types of business transactions which the bankrupt company regularly conducted prior to the appointment of a trustee
>
> . . . .
>
> This issue will not infrequently occur, and its resolution appears to be in conflict in the federal courts. It should be resolved.

750 F.2d 887 (Appendix B, at page 30b).

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,



Harold F.X. Purnell
General Counsel
Department of Business Regulation
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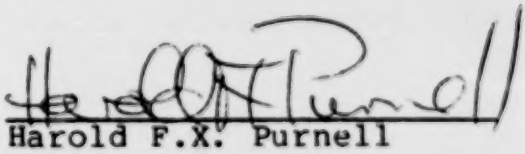
Tallahassee, FL 32301

April 12, 1985.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, first-class postage prepaid, to Reggie David Sanger, Esquire 208 Southeast 9th Street, Ft. Lauderdale, FL 33316, and to Chad P. Pugatch, Esquire 2445 East Sunrise Boulevard, Suite 1200, Ft. Lauderdale, FL 33304, this 12th day of April, 1985.



Harold F.X. Purnell
General Counsel

APPENDIX A

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

In re:	)	
	)	
CUSATO BROTHERS INTERNATIONAL, INC.,	)	CASE NO. 82-01256-BKC-SMW
Debtor.	)	
	)	
GREAT AMERICAN BANK OF BROWARD COUNTY,	)	
	)	
Plaintiff,	)	ADV.NO. 82-1180-BKC-SMW-A
vs.	)	
	)	
JAMES B. McCRACKEN, Trustee and STATE OF FLORIDA,	)	
	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come before the Court upon a Complaint for Declaratory and Injunctive Relief, Accounting and Turnover

filed herein, and the Court, having heard the testimony and examined the evidence presented; considered the arguments of counsel and being otherwise fully advised in the premises, does hereby make the following findings of fact and conclusions of law:

The Complaint in this adversary proceeding filed by Great American Bank of Broward County (Great American Bank), a secured creditor in this Chapter 7 proceeding, requests that the Court determine the rights of the parties to funds generated as a result of liquidation sales conducted by the bankruptcy trustee. Great American Bank claims rights in the fund pursuant to their security interest in all of the personal property, inventory and receivables of the debtor. The parties have stipulated that Great American Bank

holds such a security interest. The State of Florida claims that the funds are subject to a state excise tax which must be paid from the proceeds of sales.

This case was originally filed as a proceeding under 11 USC Chapter 11 and was subsequently converted to liquidation proceedings under 11 USC Chapter 7. After conversion, the trustee conducted several sales of the inventory of the corporate debtor pursuant to two separate orders of this Court.

The first order was entered on October 15, 1982 in response to Trustee's Application for Authorization to Conduct

Limited Retail/Wholesale Sale of Debtor's Inventory, in which the trustee states "The trustee is interested in liquidating the remaining inventory as quickly as possible ...". The October 15, 1982 order authorized the trustee to "conduct the requested sale for a period of 45 days from the date of this order." Pursuant to this order the trustee conducted sales which generated the following sums:

General Sales	$43,765.43
Crown Bulk Sale	$18,759.74

Prior to the expiration of the 45 day period, the trustee filed an Emergency Application for Approval of Bulk Sale of Assets to sell the remaining inventory of the debtor corporation to Miami Depot at substantially reduced prices specifically

set forth in the Application and specifically approved by the Court in its order dated November 15, 1982. In accordance with this second order the trustee conducted a bulk sale to Miami Depot which generated the total sum of $77,060.00. The broad issue before the Court is whether the sales conducted by the trustee during liquidation are subject to Florida state excise taxes levied pursuant to Fla. Sta. §§ 563.05 and 564.06. Imposition of the excise taxes would reduce the proceeds available for distribution to creditors as follows:

	Total Sum Realized From Sale	Excise Tax [1]	Balance To Creditors
General Sales	$43.765.43	$8,138.08	$35,627.35
Crown Bulk Sale	$18,759.74	$6,082.82	$12,676.92
Miami Depot Bulk Sale	$77,060.00	$28,917.52	$48,142.48
Total	$139,585.17	$43,138.42	$96,446.75

This Court has jurisdiction to determine tax liability under 11 USC 505(a)(1); 3 Collier on Bankruptcy (15th ed.) ¶ 505.04.

---

[1] The trustee has already paid $5,114.12 to the State of Florida in partial satisfaction of this total sum, which funds he seeks to have returned to the estate in the event of a ruling that the estate is not to be subject to the excise taxes.

Federal Law provides that "a trustee ... appointed in any cause pending in any court of the United States ... shall manage and operate the property in his possession ... according to the requirements of the valid laws of the State in which such property is situated." 28 USC Section 959 (b).

This provision applies to trustees in bankruptcy and establishes the general rule that a trustee in bankruptcy must comply with state laws. Finn v. 415 Fifth Ave. Co., 153 F.2d 501 (2nd Cir. 1946) cert den 328 US 838, 839, 90 L.Ed 1614, 66 S. Ct. 1014. Title 28 USC Section 960 governs tax liability of officers and agents "conducting any business under the authority of a United States Court." Section 960. Tax Liability

> Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

It is clear that Section 960 applies to the actions of trustees in bankruptcy. California State Board of Equalization v. Goggin, 245 F2d 44 (9th Cir. 1957), In re Supergate Open Steel Flooring Co., 1 BR 660 (C.D. Calif. 1979), In re 4100 North High Limited, 3 BR 232 (S.D. Ohio 1980), In re Samoset Associates, 14 BR 408 (D.Me. 1981), In re Rhea, 17 BR 789 (W.D. Okla. 1982).

The narrow issue before the Court is whether sales conducted by the trustee pursuant to court orders, and conducted for the sole purpose of liquidating assets of debtor corporation pursuant to 11 USC Chapter 7, constitute "conduct of business as contemplated by 28 USC Section 960.

The case of In re United States Products Corporation, 57 F.Supp 239 at 241 (D.C.N.D. Calif. 1944) states that to be conducting the business of the debtor "the trustee must substantially carry on the day by day normal activites, which the bankrupt, as going concern pursued." A distinction has been draw consistently between sales of

assets conducted by the trustee as an operating trustee and sales of assets conducted by the trustee for the sole purpose of liquidating an estate in bankruptcy. See: California Board of Equalization v. Goggin, In re Supergate Open Steel Flooring Co., In re Owl Drug Co., 21 F.Supp. 907 (D.C.D. Nev. 1937), United States Products Corporation Limited, 57 F.Supp. 239 (D.C. N.D. Calif 1944) Matter of F. P. Newport Corporation, Limited, 144 F.Supp. 507 (D.C. S.D. Calif. 1956), In re Samoset Associates, In re Rhea. These cases have also held that when the trustee acts for the purpose of liquidating the assets of

the bankruptcy estate, as opposed to operating the business for the purpose of making a profit, he is not "conducting any business", as contemplated by Section 960 and thus is not liable for taxes. (See citations above). One of the basis for this conclusion is the refusal of the relevant courts to impose a burden on the process of liquidation. See Goggin, at 46. See also In re Rhea, 17 BR 789 at 792 (W.D. Okla. 1982) which held "A state sales tax or its practical equivalent, is inapplicable to a federal court liquidation sale as it is burdensome on the federal court's process and on the function of the court's duly appointed officer."

The State of Florida cites several cases to the contrary: In Re Mid America Co., 31 F.Supp. 601 (E.D. Wisc. 1939), State of Missouri v. Gleick, 135 F. 2d 134 (8 Cir 1943), In re Loehr, 98 F. Supp. 402 (D.C. E.D. Wisc. 1950), In re Hatfield Construction Co., 494 F.2d 1179 (5th Cir. 1974), In re I. J. Knight Realty Corp., 501 F.2d 62 (3rd Cir. 1974). After having carefully reviewed the case law cited by the State of Florida, the Court is not pursuaded that the bankruptcy estate should be liable for the excise taxes in question. The cases of Mid America and Gleick can be

distinguished from the case at bar since in these cases, the court's decisions were based on state taxation statutes which expressly included "trustees in bankruptcy" within the definition of "Employing unit" for the purposes of the respective state unemployment compensation statutes, and as such the courts held the trustees liable for the taxes due. Such a specific statutory provision is not present in this case. The case of In re Loehr, is distinguishable since the sales of real estate conducted by the trustee in that case were profitable and extended over a period of three years, unlike the sales conducted herein which

extended over a short period of approximately two months and were consumated at liquidation prices substantially below market value. The case of In re Hatfield Construction, cited by defendants is distinguishable since in that case an operative factor in the court's determination to impose tax liability was that the tax liability imposed was to be paid by the purchaser of the assets and thus would not burden the bankruptcy estate. Here the State of Florida seeks to collect excise taxes from the trustee thus imposing a great burden on the estate.

The Court finds that the better approach to questions of liability for taxes sought to be imposed upon the bankruptcy estate during liquidation proceedings is that approach adopted in Goggin, and several recent bankruptcy court decisions. Thus, this Court follows the authority of Goggin, In re Owl Drug Co., 21 F. Supp. 907 (D.C. D. Nev. 1937), United State Products Corporation, Limited, 57 F. Supp. 239 (D.C. N.D. Calif. 1944) Matter of F. P. Newport Corporation, Limited, 144 F.Supp. 507 (D.C.S.D.Calif.1956) In re Supergrate Open Steel Flooring Co., 1 BR 660 (C.D.Fla.1979), In re Samoset Associates, 14 BR 408 (D.Mo.1981) In re Rhea 17 BR 789 (W.D.Okla 1982),

In re Loy Michael Plaster, Case No. 79-04145 (D.C.N.D. Fla. 1982) and In re Five Dames, Inc., Case No. 82-00327-BKC (S.D. Fla. 1981) all holding that a trustee in bankruptcy, acting to liquidate the assets of a bankruptcy estate, is not "conducting business" pursuant to 28 USC Section 960 and thus the estate is not subject to tax liability pursuant to Section 960. The Court finds that the trustee for the debtor was not "conducting business" when he conducted sales pursuant to this Court's orders and is not liable for excise taxes

pursuant to Fla. Stat. §§ 563.05 and 564.06 and thus the funds at issue should be turned over to Great American Bank in satisfaction of its security interest. A separate final

A separate final judgment will be entered in accordance with these findings of fact and conclusions of law.

DATED: This _____ day of March, 1983.

/s/
SIDNEY M WEAVER
Bankruptcy Judge

Copies furnished to:

Reggie Sanger, Esquire
James N. Watson, Jr., Esquire
Chad P. Pugatch, Esquire

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

In re:	)	
	)	
CUSATO BROTHERS INTERNATIONAL, INC.,	)	CASE NO. 82-01256-BKC-SMW
Debtor.	)	
	)	
GREAT AMERICAN BANK OF BROWARD COUNTY,	)	
	)	
Plaintiff,	)	ADV.NO. 82-1180-BKC-SMW-A
vs.	)	
	)	
JAMES B. McCRACKEN, Trustee and STATE OF FLORIDA,	)	
	)	
Defendant.	)	

FINAL JUDGMENT

In conformity with the findings of fact and conclusions of law of even date it is,

ORDERED, ADJUDGED and DECREED that:

1.) The sum of $139,585.17 representing the proceeds from liquidation sales conducted by the trustee pursuant to this court's orders is not subject to excise taxes sought to be imposed pursuant to Fla. Stat. §§ 563.05 and 563.06.

2.) The State of Florida shall forthwith refund the sum of $5,114.12 to the trustee representing a partial payment of excise taxes made to the State of Florida previously by the trustee.

3.) The proceeds of the liquidation sales, $139,585.17, subject to any appropriate administrative fees and expenses, be turned over to Great American Bank of Broward County in satisfaction of its security interest.

DONE and ORDERED at Miami, Florida, this 22 day of March, 1983.

/s/
SIDNEY M WEAVER
Bankruptcy Judge

Copies furnished to:

Reggie Sanger, Esquire
James N. Watson, Jr., Esquire
Chad P. Pugatch, Esquire

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-6442-CIV-JAG

IN THE MATTER OF:

CUSATO BROTHERS INTERNATIONAL, INC.,

Bankrupt,

ORDER ON APPEAL

STATE OF FLORIDA,

Appellant.

_____/

THIS CAUSE has come before the Court for review upon Appellant, STATE OF FLORIDA'S, appeal of the final judgment entered on March 22, 1983 by the Bankruptcy Court. The Court has considered the record and heard oral argument by counsel.

This appeal is the result of a complaint filed by the Great American Bank of Broward County who was a secured creditor in the Chapter 7 proceeding below in the United States Bankruptcy Court for the Southern District of Florida. Great American Bank filed a complaint for declaratory and injunctive relief, accounting and turnover, wherein it asked the Bankruptcy Court to make a ruling whether or not the proceeds of a liquidation sale of a debtor's liquor inventory was subject to Florida excise taxes as provided under Fla. Stat. §§ 563.05 and 564.06 (1979).

The action below was originally filed as a proceeding under 11 U.S.C. Chapter 7. After the conversion, the trustee conducted several sales of the inventory of the corporate debtor pursuant to two separate orders of the Bankruptcy Court.

The issue before the Bankruptcy Court was whether the sales conducted by the trustee during liquidation are subject to Florida state excise taxes levied pursuant to Fla. Stat. §§ 563.05 and 564.06 (1979). Any imposition of the excise taxes would reduce the proceeds from the liquidation sale available for distribution to the creditors before the Bankruptcy Court.

As a result of the complaint filed by Great American Bank a final judgment was entered by the Bankruptcy Court holding that the proceeds realized by the trustee in the liquidation sales were not subject to Florida's excise tax on alcoholic beverages and held that no taxes should be paid on the liquidation proceeds to the Miami Depot. The Bankruptcy Court further ordered that all prior taxes submitted by the trustee should be refunded to Great American Bank as creditor.

The debtor Cusato Brothers is a corporation licensed by the State of Florida as a beer and wine wholesale distributor under the provisions of Fla. Stat. §561.14 (1979). Pursuant to the provisions of Fla. Stat. §561.14(2)(3) (1979), a distributor is allowed sale at wholesale prices only to those persons who are licensed to sell alcoholic beverages and that no vendor licensed to sell alcoholic beverages is allowed to purchase or acquire alcoholic beverages for resale from anyone not licensed by the state. Under Fla. Stat. §561.50(1) (1979), all excise taxes are

collected at the distributor level rather than at the retail level. Since the debtor operated as a beer and wine distributor, the amount of taxation levied upon the debtor's sales to alcoholic beverage vendors is specifically governed by the provisions of Fla. State. §§563.05 and 564.06 (1979).

A trustee in bankruptcy takes the property of the bankrupt in the same plight and condition that the bankrupt held it subject to all the equities with which it was impressed in his hands.

In re: Otto F. Lang Company, 159 F.2d 586 (D.C.N.D. Iowa, 1908). In the instant case, the trustee took possession of the bankrupt's alcoholic beverage inventory. As a licensed alcoholic beverage distributor, the bankrupt's inventory carries with it certain conditions and restrictions. For example, the inventory could only be sold to licensed retail vendors and upon its sale, a tax on the volume of the sale must be paid.

The Bankruptcy Judge found that the actions of the trustee were merely those of a liquidator of the business and not those of an opertor, therefore, the trustee was

not "conducting business" within the meaning of 27 U.S.C. Section 960 and his activities in liquidating the business were not subject to taxation.

The Court in In re: MidAmerica Company, 31 F. Supp. 601 (E.D. Wis. 1939), held that where a statute places a tax upon trustees who "conduct any business" the phrase should not receive a narrow and restricted interpretation but should include any activity or operation in connection with the handling and management of the bankrupt. As to liability of the trustee in a liquidation for taxes the court reasoned that if the bankrupts

themselves liquidated their respective businesses they would each be liable for any tax provision attributable to any receipts realized.

The Court in the instant case did not specifically order the trustee to operate the debtor's business. The unique nature of the business and the trustee's actions indicate that in liquidating the beverage assets, the trustee was actually conducting the function of the bankrupt, to wit., distributing alcoholic beverages to licensed vendors or wholesalers for future sales. While not specifically dealing with an excise tax, the Court in MidAmerica held that if a liquidation of the bankrupt estate

gives rise to an incident of taxation, the trustee must pay the tax regardless of whether or not he was actively operating the bankrupt's business.

In the case of In re: Hartfield Construction Company, 494 F.2d 1179 (5th Cir. 1974), the trustee objected to the levy of a Georgia sales tax on the proceeds of a liquidation sale as placing an undue burden on the trustee and the bankruptcy proceedings. The Court denied the trustee's objection and held that absent a

which such property is situated. In Florida, the inventory in question is of a highly regulated nature with specific laws on its sales and taxation.

In Swarts v. Hammer, 194 U.S. 441 (1904), the Supreme Court held that by the transfer to the trustee, no mysterious or peculiar ownership or qualities are given to such property. The Court further held that such property is dedicated to the payment of the creditors of the bankrupt, but there is nothing within the transfer of said property to the trustee that would withdraw it from the necessity of protection by the state and municipality or which should exempt it from

obligations to either. If Congress has the power to declare otherwise and wishes to do so, the intention would be clearly expressed, not left to be collected or inferred from disputable consideration of convenience in administering the estate of the bankrupt. Id at 442.

In the instant case, the transfer of the alcoholic beverage inventory of the debtor to the bankruptcy trustee did not change the character of the inventory. The inventory remained in the nature of alcoholic beverages and continued under the

restrictions imposed by the beverage laws of the State of Florida. Under these laws, any sale of the inventory in the instant case would be subject to the alcoholic beverage excise taxes as provided for in the pertinent sections of the beverage law.

Based upon the foregoing, this Court finds that the sale of the bankrupt's alcoholic beverage inventory is subject to the levy of excise taxes pursuant to Fla. Stat. §§ 563.05 and 564.06 (1979). Therefore, the trustee is liable for the payment of the excise taxes amounting to $38,026.32 on the proceeds of the bulk liquidation sale to Miami Depot.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the final judgment of the Bankruptcy Court for the Southern District of Florida be, and the same is hereby REVERSED. This cause is hereby REMANDED to the Bankruptcy Court for further proceedings not inconsistent with this opinion.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 14th day of February, 1984.

/s/ JOSE A GONZALEZ JR.
UNITED STATES DISTRICT JUDGE

cc: all counsel

APPENDIX B

In the Matter of CUSATO BROTHERS INTERNATIONAL, INC., Bankrupt.

GREAT AMERICAN BANK OF BROWARD COUNTY,
Plaintiff-Appellant,

v.

James B. McCRACKEN, Trustee and State of Florida,
Defendants-Appellees.

No. 84-5191.

United States Court of Appeals,
Eleventh Circuit.

Jan. 15, 1985.

Reggie David Sanger, Mary Ellen Shooemaker, Fort Lauderdale, Fla. for plaintiff-appellant.

Harold F.X. Purnell, Tallahassee, FLa., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, HILL, Circuit Judge, and PECK*, Senior Circuit Judge.

JOHN W. PECK, Senior Circuit Judge:

This is an appeal from the judgment of the district court reversing the bankruptcy court. Cusato Brothers, a corporation

licensed by the State of Florida as a beer and wine wholesale distributor, filed a voluntary bankruptcy petition in June 1982; the case was subsequently converted to a Chapter 7 proceeding. The trustee, James B. McCracken, liquidated the debtor's beer and wine inventory pursuant to court order. After liquidation, Great American Bank of Broward County, a secured creditor, filed a complaint for declaratory and injunctive relief wherein it asked the bankruptcy court to rule on whether the

*Honorable John W. Peck, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

proceeds of the liquidation sale of the debtor's inventory were subject to Florida excise taxes. Florida Statute §563.05 levies an excise tax on manufacturers, distributors and vendors of malt beverages and § 564.06 imposes an excise tax upon manufacturers and distributors of wine. Under Fla. Stat. §561.50(1), all excise taxes are collected at the distributor level rather than at the retail level. The bankruptcy court found that the trustee for the debtor was not liable for excise taxes levied pursuant to Fla.Stat. §§ 563.05 and 564.06. The district court reversed. We reverse the judgment of the district court

and affirm the judgment of the bankruptcy court.

The issue before this court is whether the sales conducted by the trustee in liquidating the debtor's inventory are subject to Florida excise taxes. A threshhold question, not directly addressed by the district court, is whether the sales in question are subject at all to the Florida excise tax. As noted supra, Fla.Stat. §§ 563.05 and 564.06 impose excise

taxes upon manufacturers, distributors, and vendors of beer and wine. The statutes do not specifically include bankruptcy trustees. Because Florida law forbids the sale of any alcoholic beverages within the state without a license, the district court apparently considered the trustee to be operating under the authority granted to Cusato Brothers by the State of Florida to operate as an alcoholic beverage distributor. We have not been pursuaded that §§ 563.05 and 564.04 do not apply to the transactions in question; therefore, we do not dispute the assumption of the district court that the trustee acted as a distributor subject to Florida law

conducting the liquidation sales.

Title 28 U.S.C. § 959(b) requires a trustee to manage and operate the property in his possession in accordance with the

1

applicable state law. Title 28 U.S.C. § 960 states:

1 28 U.S.C. § 959(b) provides: A trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

> Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such businesses to the same extent as if it were conducted by an individual or corporation.

Since we agree that the trustee acted as a distributor for purposes of Fla.Stat. §§ 563.05 and 564.06, the question presented becomes whether the trustee was "conducting any businees" within the purview of 28 U.S.C. § 960 in liquidating the debtor's inventory.

The bankruptcy court held that the trustee in bankruptcy who liquidated the assets of

the bankruptcy estate was not "conducting any business" and thus the estate was not subject to tax liability. The district court, however, adopted the view that the trustee in the instant case took possession of the debtor's alcoholic beverage inventory subject to conditions and restrictions imposed by Florida law. The district court stated:

> The unique nature of the business and the trustee's actions indicate that in liquidating the beverage assets, the trustee was actually conducting the function of the bankrupt, to wit, distributing alcoholic beverages to licensed vendors or wholesalers for future sales.

The district court took note of the highly regulated nature of alcoholic beverage transactions in concluding that, under 28 U.S.C. §959(b), the sale of debtor's inventory was subject to the excise tax as provided in Fla. Stat. §§ 563.05 and 564.06. The district court relied on In re Hatfield Construction Company, 494 F.2d 1179 (5th Cir. 1974), in which the trustee in bankruptcy objected to the levy of a Georgia sales tax on the proceeds of a liquidation sale of the bankrupt's tangible personal property. The purchasers had paid the sales tax in question and the fund was placed in the hands of the trustee. The court in Hatfield held that "property in the hands of the trustee in bankruptcy is not thereby

exempt from state and local taxes, absent a clear expression from Congress to the contrary. Section 960 is not such a clear expression at least where the tax on the liquidating function is imposed on the purchaser in liquidation." (citatior omitted) (Hatfield, supra at 1181.) The court in Hatfield stated that it found the reasoning of In re Leavy, 85 F.2d 25 (2d Cir. 1936), persuasive. In Leavy, the court held that a bankruptcy liquidation sale was subject to the New York City sales tax, which imposed primary liability for the tax

on the purchaser with secondary liability upon the seller, the same as the Georgia act in Hatfield. The court in Leavy reasoned:

A tax on a sale made by a trustee under an order of court for purposes of liquidation if payable directly and primarily by him would doubtless be a burden on a governmental instrumentality, for a judicial sale in liquidation of a bankrupt estate would in a peculiar sense involve the exercise of a federal function.

Indeed, without the exercise of such a function and the power thus to dispose of assets, administration in bankruptcy would hardly be practicable. A tax on the vendee in connection with a sale in liquidation of a bankrupt's estate is, at least in a formal sense, quite different from a tax for which the vendor is made primarily liable. (Leavy, supra, at 27.) The bankruptcy court distinguished Hatfield on the basis that the tax liability imposed in that case was to be paid by the purchaser and thus would not

burden the bankruptcy estate, whereas in the present action the State of Florida seeks to collect excise taxes imposed at the distributor rather than consumer level. The district court, however, rejected the reasoning of the bankruptcy court, stating that the ultimate tax on the alcoholic beverage inventory is paid by the consumer, but is collected and remitted by the distributor. Thus, the district court concluded, to not impose the excise tax would result in the debtor's

inventory entering the marketplace without the alcoholic beverage tax having been paid. However, in light of the rationale of Leavy, we find the position of the bankruptcy court persuasive and agree that Hatfield is distinguishable from the present situation in which the primary liability for the tax is on the distributor. There is a split of judicial authority on the issue of whether a trustee in bankruptcy is responsible for the payment of state taxes during liquidation.

In California State Board of Equalization v. Goggin, 245 F.2d 44 (9th Cir. 1957), cert. denied, 353 U.S. 961, 77 S.Ct. 863, 1 L.Ed. 2d 910 (1957), the court held that the California State Board of Equalization could not collect from the trustee in bankruptcy, or from a purchaser from him, any tax based upon a sale of the debtor's tangible personal property in liquidation of the estate. An imposition of the tax, the court reasoned, would be an impermissible burden upon the liquidation process and would be

inconsistent with the designation by Congress in 28 U.S.C. § 960 that sales in the course of conducting a business is the sole area in which the state is permitted to impose a tax. Other courts have drawn a distinction between the sale of assets conducted by the trustee as an operating trustee and the sale of assets in liquidation of the bankrupt estate. See In re Rhea, 17 B.R. 789 (Bankr.W.D.Okla.1982); In re Samoset Associates, 14 B.R. 408 (Bankr.D.Me.1981); In re Supergrate Open

Steel Flooring Co., 1 B.R. 660 (Bankr.C.D.CAl.1979). These cases generally have held that a trustee who conducts sales to liquidate the assets of the bankrupt estates is not "conducting any business" under the purview of 28 U.S.C. § 960 and thus does not incur tax liability. In addition, some courts have relied upon the reasoning of Goggin, supra, that imposition of state tax laws which impose sales tax on court ordered bankruptcy liquidation burdens the liquidation process. In re Sheldon's, Inc.

of Maine, 28 B.R. 568 (Bankr.D.Me.1983); Rhea, supra.

The appellees urge that the above cases are distinguishable from the present situation because those cases involved the liquidation of assets other than stock-in-trade. Appellees assert the argument that, although liquidating an estate does not in and of itself constitute "conducting business," a trustee who sells the debtor's inventory is actually conducting the business of the debtor and therefore should be liable for taxes just as

though the debtor had sold the inventory. However, a review of the above cases reveals that the characterization of the property sold was not a relevant factor in the decisions; in fact, the nature of the assets was not even reported in several of the cases. See, e.g., Goggin, supra; Rhea, supra.

On the other hand, several courts have held that the trustee in bankruptcy was "conducting business" and thus have imposed tax liability. Hatfield, supra;

United States v. Sampsell, 266 F.2d 631 (9th Cir.1959); State of Missouri v. Gleick, 135 F.2d 134 (8th Cir.1943); In re Loehr, 98 F.Supp. 402 (E.D.Wisc.1950); In re Mid America, 31 F.Supp. 601 (S.D.Ill.1939); In re Sunrise Construction Co., 39 B.R. 668 (D.Wyo.1984). In both Mid America and Gleick, the issue was whether the respective states could impose unemployment compensation taxes upon a liquidating trustee in bankruptcy. The "tax" involved in both cases was the payment of

unemployment compensation contributions for individuals who performed services for the trustees in connection with liquidation of the bankrupt estates. Having concluded that such contributions were "taxes," the court in Mid America held that the phrase "conduct any business" included "activity or operation in connection with the handling and management of the bankrupt estate." (at 607) The court in Gleick adopted the reasoning of Mid America. The bankruptcy court distinguished Mid America and Gleick

because the state taxation statutes involved expressly included "trustees in bankruptcy" within the definition of "employing unit" for the purposes of the respective state unemployment compensation statutes. In Sunrise Construction, the district court also followed the reasoning of Mid America in holding that imposition of an excise tax did not impermissibly burden the bankrupt estate. As in Hatfield, supra, the tax had been collected from the purchasers of personal property at a liquidation sale.

Based upon the above analysis, this court tends toward the reasoning of Goggin, supra, and therefore holds that the trustee was not "conducting any business" within the contemplation of 28 U.S.C. § 960 in liquidating the debtor's inventory. Thus, we conclude that the bankruptcy court properly held that the estate is not subject to tax liability pursuant to Fla.Stat. §§ 563.05 and 564.06.

Accordingly, the judgment of the district court is REVERSED.

JAMES C. HILL, Circuit Judge, dissenting:

I respectfully dissent. The correct resolution of the issue presented in this case is not all clear. While we are not given sufficient navigational aids by Congress, the waters on which we venture are not uncharted. In 28 U.S.C. § 960, Congress provided that:

> Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

We find no other expression by Congress on the general subject presented on this appeal, and our task is thus to interpret section 960 and apply it to the present case.

Property in bankruptcy is subject to applicable state and local taxes absent a clear expression by Congress of an intent to create an exemption. Swarts v. Hammer, 194 U.S. 441, 444, 24 S.Ct. 695, 696, 48 L.Ed. 1060 (1904).

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When Congress addressed the question of whether or not the sale of merchandise by a trustee in bankruptcy is subject to state taxation, it is clear that it came down on the side of respecting the state tax authority. Congress knew that a trustee in bankruptcy is often faced with the task of liquidating the business, which involves the disposing of merchandise. Although liquidation sales of inventory by a trustee are terminal, these are the same types of business transactions which the bankrupt

company regularly conducted prior to the appointment of a trustee. If a corporation undertakes to liquidate its entire inventory of merchandise and go out of business, it can hardly be said that the corporation was not "conducting its business," even though at the end of the series of transactions the business would be at an end.

Accordingly, I conclude that, although not entirely clear, section 960 should be interpreted as providing for the eventuality of liquidation by the trustee, just as it

provides for transactions by the trustee in operating business as a going concern. Selling to customers from a going-concern and selling to customers in order to liquidate inventory both appear to me, without more specific congressional action, to constitute "conducting any business" so as to subject the sales to state taxation under section 960.

I am persuaded that the rationale of State of Missouri v. Gleick, 135 F.2d 134 (8th Cir.1943), is sound. The taxable

transaction at issue in that case was not the same as the transaction at issue in the instant case, but the analysis does, I believe, apply.

This issue will not infrequently occur, and its resolution appears to be in conflict with the federal courts. It should be resolved.

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 84-5191

D.C. Docket No. 83-6442

IN THE MATTER OF: CUSATO BROTHERS INTERNATIONAL, INC., BANKRUPT.

GREAT AMERICAN BANK OF BROWARD COUNTY,

Plaintiff-Appellant,

versus

JAMES B. McCRACKEN, TRUSTEE and STATE OF FLORIDA, Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

---

Before GODBOLD, Chief Judge, HILL, Circuit Judge and Peck*, Senior Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

---

*Honorable John W. Peck, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

HILL, Circuit Judge, dissented and filed an opinion.

Entered: January 15, 1985

For the Court: Spencer D. Mercer, Clerk

By: /s/ Warren A. Godfrey

ISSUED AS MANDATE: Feb 6 1985

84-1751

Office - Supreme Court, U.S.
FILED
MAY 17 1985
ALEXANDER L. STEVAS,
CLERK

NO.

in the
Supreme Court
of the
United States
October Term, 1985

IN THE MATTER OF: CUSATO BROTHERS INTERNATIONAL, INC., BANKRUPT
JAMES B. McCRACKEN, TRUSTEE AND STATE OF FLORIDA,

Petitioner,

vs.

GREAT AMERICAN BANK OF BROWARD COUNTY,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respectfully submitted,

by MARY ELLEN SHOEMAKER, ESQ.
REGGIE DAVID SANGER, ESQUIRE
208 S.E. 9th Street
Fort Lauderdale, FL 33316
(305) 463-8547

17pp

NO.

in the

Supreme Court

of the

United States

October Term, 1985

IN THE MATTER OF: CUSATO BROTHERS INTERNATIONAL, INC., BANKRUPT JAMES B. McCRACKEN, TRUSTEE AND STATE OF FLORIDA,

Petitioner,

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GREAT AMERICAN BANK OF BROWARD COUNTY,

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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SUMMARY OF THE ARGUMENT

There is no need for this Court to resolve any conflicts between the Twenty-first Amendment and the Bankruptcy Clause as there are Federal statutes which have already resolved the conflict; by statute the Bankruptcy Trustee is liable for State taxes only where he is actually conducting the business, not liquidating the business.

The holding in the Eleventh Circuit does not conflict with either *Swarts vs. Hammer*, 194 U.S. 441 (1904) or with *Ashton vs. Cameron County Water Improvement District*, 298 U.S. 513 (1936). Neither case involves a liquidation sale by a bankruptcy trustee. *Ashton* involves a water district, a political subdivision of California, which sought the protection of the Bankruptcy court for relief from its creditors. *Swarts* involves the Trustee's obligation to pay state property tax for personal property in his custody.

Finally, there is no conflict among the Circuits as to whether state taxes are due when a Trustee liquidates inventory. The Petitioner claims that in the Second, Third, Fifth, Seventh and Eighth Circuits taxes would be imposed on the Trustee. The Petitioner cites one case for each Circuit, but each case can be distinguished from the case at bar. Both the Second Circuit and the Fifth Circuit cases involve a very narrow situation in which the primary liability for the tax is on the purchaser at the liquidation sale and not on the seller/Trustee. That is not the situation in the case at bar.

Both the Third Circuit and Seventh Circuit cases involve taxes imposed during the time the Trustee was

operating an ongoing profitable business, not when he was liquidating inventory. Further, both cases involve the payment of Federal taxes, not State taxes as in the case at bar. Finally, the Eighth Circuit case involves a state statute which specifically makes a Trustee in bankruptcy liable for unemployment taxes.

The Eleventh Circuit does not stand alone in prohibiting taxation of liquidation sales. In the Ninth Circuit, if the Trustee is not operating the business but merely liquidating inventory, no tax will be imposed.

ARGUMENT I

ANY CONFLICT BETWEEN THE TWENTY-FIRST AMENDMENT AND THE BANKRUPTCY CLAUSE HAS BEEN RESOLVED THROUGH FEDERAL STATUTE, AND DOES NOT NEED TO BE RESOLVED BY THIS COURT

The Petitioner argues that there is a conflict between the Twenty-first Amendment and Congress' power under the Bankruptcy Act, and that the conflict should be resolved by this Court. The Eleventh Circuit did not address the Twenty-first Amendment in its decision.

Rather the Eleventh Circuit relied on Federal statutes to determine whether tax liability should be imposed at a liquidation sale. First, a Trustee is required to manage and operate property within his possession according to applicable State law. 28 U.S.C. §959(b)(1978).* Second, any officers conducting business under the authority of the United States Court are subject to

*28 U.S.C. §959(b) (1978)

> A trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

taxes when they are conducting the business. 28 U.S.C. §960. (1948).**

The legislative history of 28 U.S.C. §960 shows that Congress intended the tax liability to be the same for a Trustee conducting the business under court order as it would have been had the owner continued to *possess and operate* the business. *Palmer vs. Webster*, 312 U.S. 156, 162 (1948) citing 28 U.S.C. §124a, the former §960 (emphasis added).

But where a Trustee conducts a liquidation sale of the debtor's assets, he is not conducting a business under the purview of 28 U.S.C. §960 (1948). *In re Rhea*, 17 B.R. 789 (Bankr. W.D. Okla. 1982); *In re Samoset Associates*, 14 B.R. 408 (Bankr. D. Me. 1981); *In re Supergrate Open Steel Flooring Co.*, 1 B.R. 660 (Bankr. C.D. Cal. 1979).

**28 U.S.C. §960 (1948) Tax Liability

> Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

ARGUMENT II

THE ELEVENTH CIRCUIT HOLDING DOES NOT CONFLICT WITH ASHTON VS. CAMERON COUNTY

The State of Florida argues that the Eleventh Circuit holding conflicts with the ruling of *Ashton vs. Cameron County Water Improvement District*, 298 U.S. 513 (1936).

In *Ashton, supra*, the issue was whether a political subdivison of California, a water district, could seek protection in the Bankruptcy Court by filing a voluntary petition for relief. This Court determined that the power of Congress under the bankruptcy clause did not extend to states or their political subdivisions. Since *Ashton* does not involve a liquidation sale, it does not conflict with the Eleventh Circuit holding.

ARGUMENT III

THE ELEVENTH CIRCUIT HOLDING DOES NOT CONFLICT WITH SWARTS VS. HAMMER

The State of Florida also argues that the Eleventh Circuit decision conflicts with *Swarts vs. Hammer*, 194 U.S. 441 (1904). In *Swarts*, the Trustee had $68,320.00 of funds belonging to the estate in a bank account, and the funds were determined to be subject to property taxes.

The Eleventh Circuit holding and *Swarts, supra*, are not in conflict as *Swarts* deals with personal property in the hands of the Trustee while the business is in operation, *not* liquidation. The distinction is between operating an ongoing business for profit on one hand, and liquidating an inventory at a loss on the other hand. A tax on the latter is a burden to the judicial process:

> A tax may be levied upon specific property in the hands of a trustee in bankruptcy. *Swarts vs. Hammer*, 194 U.S. 441, 24 S.Ct. 695, 48 L.Ed. 1060. But no state is empowered to levy taxes upon the process of the courts of the United States or to impede the officers of court in an essential judicial function. *McCulloch vs. Maryland*, 4 Wheat 316, 432, 17 U.S. 316, 432, 4 L.Ed. 579.

cited in *California State Board of Equalization vs. Goggin*, 191 F.2d 726, 730 (9th Cir. 1951).

ARGUMENT IV

THE HOLDING OF THE ELEVENTH CIRCUIT DOES NOT CONFLICT WITH THE HOLDINGS OF OTHER CIRCUITS

The Petitioner argues that there is a conflict among the Circuit Courts of Appeal on this issue. But there is no conflict.

The Petitioner claims that in the Second, Third, Fifth, Seventh and Eighth Circuits, taxes would be imposed on the bankruptcy Trustee at a liquidation sale. However, the cases cited in support thereof for the Second and Fifth Circuits can be distinguished from the Eleventh Circuit holding: *In Re: Hatfield Construction Co.*,, 494 F.2d 1179 (5th Cir. 1974) and *In Re: Leavy*, 85 F.2d 25 (2nd Cir. 1936). In both these cases, the courts approved of the imposition of a sales tax because the tax was to be imposed on the purchaser at the liquidation sale rather than on the seller/Trustee, and thus there was no burden on the bankruptcy process.

Likewise, the Third Circuit and Seventh Circuit cases cited can be distinguished: *In Re: I.J. Knight Realty Corp.*, 501 F.2d 62 (3rd Cir. 1974) and *Pinkerton vs. United States*,, 73 F.Supp. 590 (S.D. Ill. 1947), *affirmed*, 170 F.2dd 846 (7th Cir. 1948). In the first place, both cases involve the imposition of Federal income taxes not a state tax, and neither case deals with a liquidation sale. Further, *Knight, supra*, deals with a Trustee who received capital gains income generated from a condemnation salle of land and income from interest on insurance proceeds over a seven year period. *Pinkerton, supra*, deals with a Trustee in a State court proceeding,

not a bankruptcy Trustee, who was held responsible for Federal taxes on rental income and capital gains.

The Eighth Circuit case can be distinguished in that it is based on a specific Missouri statute which expressly includes "bankruptcy trustees" within the category of those liable for State unemployment taxes. *State of Missouri vs. Gleick*, 135 F.2d 134 (8th Cir. 1943).

The Eleventh Circuit is not alone in prohibiting the taxation of bankruptcy trustee liquidation sales. The Ninth Circuit also refuses to impose a tax where the Trustee is merely liquidating. *California State Board of Equalization vs. Goggin*, 245 F.2d 44 (9th Cir. 1957) *cert. denied*, 353 U.S. 961 (1957). The Petitioner claims that the Ninth Circuit in *Goggin*, distinguishes liquidation sales of assets other than inventory from liquidation sales of strictly inventory, and imposes a tax only on the former. However, the characterization of the property sold was not a relevant factor in the decision.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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May 6, 1985

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, first-class postage prepaid, to Harold F. X. Purnell, General Counsel, Department of Business Regulation, 725 South Bronough Street, Tallahassee, Florida 32301 this 10 day of May, 1985.

Mary Ellen Shoemaker

by MARY ELLEN SHOEMAKER, ESQ.
REGGIE DAVID SANGER, ESQUIRE